87-118

Supreme Court, U.S.
FILED
JUL 18 1987
JOSEPH F. SPANIOL, JR.
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No. _____

In the Supreme Court of the United States

October Term, 1987

JANET G. MAYNARD,

Plaintiff and Appellant,

v.

HARRY PRIESTER,

Defendant and Respondent.

PETITION FOR WRIT OF CERTIORARI

Law Offices of
MARVIN M. MITCHELSON
1801 Century Park East
Suite 1900
Los Angeles, California 90067
Telephone: (213) 277-5545

By: MARVIN M. MITCHELSON
Attorneys for Plaintiff and Appellant,
JANET G. MAYNARD

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTION PRESENTED

1. Whether dismissal of Petitioner's case, pursuant to California Code of Civil Procedure Section 583.310, is a violation of her rights under the Fourteenth Amendment of the United States Constitution?[1]

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[1] List of parties:

JANET G. MAYNARD, Petitioner
and
HARRY PRIESTER, Respondent

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No. _____

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JANET G. MAYNARD,

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PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

Decision and Findings of Fact and Conclusions of Law in the Second Appellate District, Division Two Case No. B017135. See Appendix "A" hereto.

Order Denying Review in the Supreme Court of the State of California. Case No. B017135, April 22, 1987. See Appendix "B" hereto.

JURISDICTIONAL STATEMENT

The statutory provision believed to confer jurisdiction on this Court to renew by Writ of Certiorari the judgment in question is 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS

The constitutional provision involved in this case is as follows:

(a) The "due process clause" of Section 1 of the Fourteenth Amendment to the Federal Constitution.

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

As pleaded in Petitioner's Complaint action was brought against Respondent to obtain relief for damages as the result of his renegement and breach of certain agreements to care and provide for, and support Petitioner. Respondent had obtained the trust and confidence of Petitioner and had agreed to provide for her for the rest of her life, and in return he had received her services as his confidante, travel companion, homemaker, decorator and real property manager (CT-14).[2]

Respondent did not file demurring papers until October 31, 1980 (CT 15), over one year after the Complaint was filed. Thereafter, hearing on the demurrer was continued three times at the request of Respondent

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[2] Hereinafter the Clerk's Transcript will be referred to as CT.

(CT 49, 52, 55), once at the request of Petitioner (CT 58). The demurrer was denied on March 2, 1981 (CT 59). The content and allegations contained in the Complaint are highly controversial as relief was sought for breach of argument arising during a nonmarital relationship during which Respondent maintained at least the appearance of cohabitation with his then wife (CT 491, 1-14).

Petitioner was able to successfully defend against demurrer at which time Respondent sought writ of mandate in the Court of Appeal by petition filed May 1, 1981 (CT 531-534). Upon denial of the petition by the Court of Appeal on May 14, 1981, (CT 531-534) Respondent petitioned the California Supreme Court for mandamus on May 26, 1981 (CT 531-536). The California Supreme Court denied the petition by notice dated June 10, 1981 (CT 533-536). Due to the time expended in these mandamus and demurrer proceedings, Respondent's Answer was not filed until July 17, 1981 (CT 65).

Petitioner filed At-Issue Memorandum on August 12, 1982 (CT 76-77). Respondent gave Notice of Trial Setting Conference set for June 15, 1984 (CT 258-259). At that time, the matter was taken off-calendar "subject to resetting" (CT 260-262).

Discovery commenced in or about late 1982 (CT 82) and continued to and throughout 1985 (CT 455). A protective order was sought against Respondent's overly intrusive discovery for which Respondent made a Motion to Compel (CT 124, etc., 144, etc.). The Motion to Compel was denied and the Motion for Protective Order was granted (CT 239-240).

Thereafter, Respondent moved for an amended answer to the complaint (CT 272). That motion was stipulated

to by Respondent (CT 453-454). Respondent filed his First Amended Answer on December 12, 1984 (CT 453-454), approximately three and one-half years after the filing of his Answer to the Complaint.

Throughout these proceedings, Petitioner was engaged in discovery as well as opposing motions made by Respondent. As is evidenced in the record, there was no "lack of prosecution" on the part of the Petitioner. Any delays caused in bringing this action to trial, were necessitated by Respondent's actions.

Notice of Motion and Motion to Dismiss Plaintiff's Complaint for lack of prosecution was filed on October 4, 1985 (CT 459). That motion, also, was opposed by opposition filed October 16, 1985 (CT 490). Petitioner, upon leave of the court filed and noticed Notice of Motion and Motion to Specially Set Trial Date (CT 496, 503, 507). On October 21, 1985, the Court granted the dismissal on authority of California Code of Civil Procedure Section 583.310 (CT 509).

ARGUMENT

A.

Petitioner Was Denied Due Process Of Law In Violation Of The Fourteenth Amendment To The United States Constitution.

1. Although impossibility, impracticability and futility is supposed to prevent application of the five-year rule, said excuse was arbitrarily not allowed herein.

Petitioner's right to due process of law was violated by the summary dismissal of a meritorious case by the lower courts.

California Civil Procedure Code Section 583.310 reads:

> "An action shall be brought to trial within five years after the action is commenced against the defendant."

This statute places an affirmative duty on plaintiff to act with reasonable diligence in order to bring a case to trial within the five year period. *Hill v. Bingham* (1986), (2nd dist.) 181 Cal.App.3d 1. While the plaintiff is required to act with due diligence, due diligence has been defined by the courts in a case by case analysis. This method does not, and cannot, lead to uniformity of decisions in the various courts where this issue will arise. Without a standard, by which litigants, and the courts, can be guided, the due diligence requirement of Section 583, as well as the exceptions contained in California Civil Procedure Code Section 583.310, can only result in confusion, and arbitrary, capricious and inconsistent state court action.

In the instant case, from the date of which the demurrer was originally noticed, October 28, 1980, through and

including June 10, 1981, the term of its pendency, it was impossible, impracticable and futile to proceed with this action and the five year period under C.C.P. Section 583.310 was tolled.[3]

Until the issues raised by the writ of mandate were finally resolved, Petitioner could not proceed with her case. Depending on the outcome of the demurrer and writ proceedings, there was a substantial likelihood that Petitioner would not be able to proceed with the Complaint. Due to the controversial nature of the allegations and the relief sought by the Complaint, it was very probable that an opinion of and decision by the trial court, Court of Appeal and the Supreme Court would be sought with respect to the viability of the action. Consequently, under California Civil Procedure Code Section 583.310(c) Petitioner acted with due diligence by reason of the impossiblity, impracticability, or futility of any other action on her part during the pendency of these proceedings. To, then, deny her of the right to litigate a meritorious case, by an arbitrary application of C.C.P. Section 583.310 without a review of the circumstances involved.

2. Plaintiff's obligation to proceed with due diligence is satisfied where the delays are caused by defendant's actions.

California Civil Procedure Code Section 583,

> ". . . requires the trial judge to exercise his discretion to prevent or deny the defendant's motion to dismiss if the plaintiff has failed to

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[3]The tolling period under this calculation is 225 days. The narrowest calculation would result in a 41 day tolling period, from May 1, 1981 to June 10, 1981, the period during which Respondent's writ petition was pending in the Court of Appeal and Supreme Court.

> have the trial of his action commenced within two years of the filing of the complaint. However, the exercise of this discretion is not free from appellant review if it has been abused. The trial judge may not act arbitrarily or capriciously in exercising his discretion. His decision must be governed by a consideration of existing legal principles and by the drawing of appropriate analogies to existing case law. [citation] Such discretion must be exercised in such a manner as to further, not defeat, the ends of justice [citation]."

City of Los Angeles v. Superior Court (1969) 271 Cal.App.2d 292, 294; 76 Cal.Rptr. 256. It has been said that absent a showing that "plaintiff has failed to exercise due diligence or fail[ed] to make a showing of excusable delay" dismissal will result. (*Id.* at 295.) Yet, while the "burden is at all times on the plaintiff to use diligence at every step of the proceedings to expedite his case to final determination" (*Gunner v. Van Ness Garage* (1957) 150 Cal.App.2d 345, 347; 310 P.2d 32) it is a violation of plaintiff's due process rights to summarily dismiss an action where defendant's dilatory inactivity expends substantial time resulting in passage of the five year limitation period.

As in the instant case, where Respondent created the necessity for time consuming proceedings, including a protective order in opposition to unsuccessful motions to compel discovery, the court should not arbitrarily dismiss an action without a thoughtful review of the circumstances. The Fourteenth Amendment to the United States Constitution guarantees "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for

hearing . . ." *Mullane v. Central Hanover Co.* (1950) 339 U.S. 306, 313; 94 L.Ed. 865, 870; 705 S.Ct. 652. Where an individual cannot proceed with adjudication of his or her case because of adherence to a statutory rule, without a thoughtful review of the reasons behind the passage of time, then that person's right to be heard before being deprived of it is denied.

The Law Revision Commission Comment to California Civil Procedure Code Section 583.310 explains:

> "Subdivision (c) codifies the case law 'impossible, impracticable, or futile' standard. The provisions of subdivision (c) must liberally be interpreted, consistent with the policy favoring trial on the merits.
>
> Under Section 583.340 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial elipses."

It is obvious from the statutory scheme, and the policy behind them, that the legislature has attempted to expedite the bringing of cases to trial. Even so, there is a preference that all cases be litigated on their merits. The goal of litigation on the merits cannot be satisfied where there is no standard enunciated in either case law or statute.

Respondent, in his Respondent's Brief, cites with approval the decision in *Oberkotter v. Spreckels* (1923) 64 Cal.App. 470, 473; 221 P.698. Petitioner does not argue that "[i]t is true that the Defendant may bring about a trial of the case, but he is under no legal duty to do so. His presence in the case is involuntary and

his attitude toward it is quite different from that of the Plaintiff; he is put to a defense only, and can be charged with no neglect for failing to do more than meet the Plaintiff step by step." *Crown Coach Corp. v. Superior Court* (1972) 8 Cal.3d 540, 548; 503 P.2d 1374. The *Oberkotter* and *Crown Coach* courts were not faced with the same issue as is found in the instant case. In those cases, Defendant did not actively and affirmatively delay the proceedings with burdensome and unnecessary discovery.

In certain instances, as in *Oberkotter,* Plaintiff's lack of due diligence is strikingly apparent. In that case, there was a trial on the merits. The jury, unable to come to a verdict, was dismissed. For two years Plaintiff failed to file any papers or bring the case to trial. Thus, the court not only granted the dismissal but the dismissal was affirmed on appeal.

Some cases, though, are not as straightforward or as susceptible to strict, rigid application of C.C.P. Section 583, nor should they be. Discovery is a time consuming activity, one which cannot only be used but abused to delay settlement or judgment. A plaintiff's diligence can be subverted by a defendant's actions, whether in good faith or not. The courts should not only look to the diligence of a plaintiff but to the obstructions created by a defendant.

In the instant case, Respondent created the necessity for time consuming proceedings such as demurrer, a protective order and opposition to an unsuccessful motion to compel discovery. Very late in the action, even, at Respondent's request, Petitioner was requested to allow Respondent to file an amended answer. Under such circumstances, a court should not be allowed to dismiss a case that has been vigorously litigated on the

part of a plaintiff but, due to the actions of a defendant, the case does not come to trial within five years.

California Civil Procedure Code Section 583, should be flexible enough to allow a plaintiff "unable from causes beyond his control to bring the case to trial either because of a total lack of jurisdiction in the strict sense on the part of the trial court or because proceeding to trial would be both impracticable or futile" (*Woley v. Turkus* (1958) 51 Cal.2d 402, 407; 334 P.2d 12) to litigate his or her case on the merits and not be forced to, because of some strict adherence to a procedural requirement, be denied that right.

3. Where petitioner has acted with due diligence, where defendant's actions resulted in substantial delays and where no prejudice has been shown, dismissal of the case under authority of California Civil Procedure Code Section 583 is a violation of petitioner's due process rights.

Not only was Respondent unable to show a lack of due diligence on the part of Petitioner, but he has failed to show any prejudice to him by allowing Petitioner to litigate the merits of her case. Therefore, tolling of the limitation period was appropriate and dismissal improper. *Fay v. Mundy* (1966) 246 Cal.App.2d 231, 238; 254 Cal.Rptr. 591; *Westinghouse Electric Corp. v. Superior Court* (1983) 143 Cal.App.3d 95, 102; 191 Cal.Rptr. 549.

In *Campanella v. Takaoka* (1984) 160 Cal.App.3d 504 the plaintiffs applied for an order shortening time to five (5) days before the hearing on their motion to specially set the case for trial, informing the trial court that the five year statute would run in less than a month

and without such an order, plaintiffs' motion would be heard only two weeks prior to the running of the period (160 Cal.App.3d at pp. 509-509). The trial court denied plaintiffs' application for the order shortening time (*Id.*, at p. 509). Subsequently, plaintiffs moved to specially set the case for trial (160 Cal.3d at 509). Defendants opposed the motion and also requested that the action be dismissed pursuant to C.C.P. Section 583(a) (*Ibid.*) The trial court denied plaintiffs' motion to specially set. On appeal, the *Campanella* court reversed, holding that *it is mandatory* to grant a plaintiff's motion for an early trial setting.

The holding in *Campanella* is a correct interpretation of this Court's decision in *Weeks v. Roberts* (1968) 68 Cal.2d 802. Therein, the trial court vacated a trial date within the five year period and subsequently dismissed the action for failure to bring it to trial within that period. On appeal, this Court noted that certain Court of Appeal decisions had held that a refusal to specially set a case to avoid the bar of Section 583 is discretionary, and in ruling on a motion to specially set, the trial court could view the total picture, including the dilatory action of the plaintiff (68 Cal.2d, at p. 806). This Court held that the fact that a trial court believes a discretionary dismissal is warranted is not a ground for refusing to set a case within the five year period (68 Cal.2d at 806). This Court recognized that a trial court should not "exercise its discretion to dismiss on the basis of inconvenience to the trial court in the guise of a refusal to specially set." (68 Cal.2d at 807.) This Court held that the trial court did *not* have the discretion to refuse to set a date within the statutory period (68 Cal.2d at 808). *As a matter of law* "28 days is a reasonable time within which to set a matter for trial," and where less than 28 days is involved "*a preferred procedure would*

be to grant preferential dates expressly without prejudice to a motion to dismiss." 68 Cal.2d at 808. (Emphasis added.)

The *Campanella* case, *supra*, noted that the decision in *Karubian v. Security Pacific Nat. Bank* (1984) 152 Cal.3d 134, seemed to arrive at a contrary result, holding that the denial of an early trial setting was not an abuse of discretion even though the motion was noticed 40 days prior to the expiration of the five year period (*Campanella, supra*, 160 Cal.App.3d at 514). As the *Campanella* case noted, *Karubian* is not persuasive for various reasons, the most significant being that it relied on *General Ins. Co. v. Superior Court* (1966) 245 Cal.App.2d 366, *hearing denied*, which was limited by the subsequent decision in *Weeks v. Roberts, supra* (see *Campanella, supra*, 160 Cal.App.3d at 514). Moreover, the *Karubian* case did not address the proposition that the *Weeks v. Roberts* decision set down the rule that a "preferred procedure" is to grant preferential dates without prejudice to a motion to dismiss (68 Cal.2d at 808). As a "preferred procedure" it is mandatory on the trial court. See *Bozanich v. Kenney* (1970) 3 Cal.3d 567, 571. (The "preferred procedure", hereinabove discussed, not available only to a diligent plaintiff but also to one considered to have been less than diligent. This fact merely supports the avowed policy of litigating all cases on their merits and allowing all plaintiffs every opportunity to litigate their claims.)

Even if Petitioner was adjudged dilatory (which she was not) the *Campanella* and *Kotoff v. Efseaff* (1985) 172 Cal.App.3d 991 cases have correctly construed *Weeks v. Roberts, supra*, and have concluded the remedy for a plaintiff's failure to diligently prosecute is to grant

a discretionary dismissal, not to refuse to specially set. As pointed out above,

> ". . . a trial court should not confuse and discredit the law by refusing to set a cause within the five year period because it believes that a discretionary dismissal is warranted . . . if a court feels compelled to dismiss an action less than five years after its filing for want of prosecution, it should do so and accept review on that basis. It should not exercise its discretion to dismiss . . . in the guise of a refusal to specially set." (68 Cal.2d at 806-807.) (Emphasis added.)

In *Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 347, 228 Cal.Rptr. 504, 507, the California Supreme Court held that where an "appalling" lack of diligence was shown, trial preference was not mandatory. Yet, no such showing was made before Petitioner was deprived of her right to have her claim adjudicated. After waiting so long, it was a violation of her Due Process rights to bar her from a trial on the merits.

In the present action, the matter was vigorously litigated, including defense against multiple demurrers, discovery and discovery motions and proceedings in the Court of Appeal. An at-issue memorandum was filed, but the trial-setting conference was taken off calendar in 1984 while discovery continued through 1985. Petitioner, throughout these proceedings, was acting with diligence and pursuing her claim even in the face of Respondent's actions.

Therefore, plaintiff and petitioner was wrongfully precluded from relief. The result of the trial court's action herein was unjust and inequitable, against law, and in violation of plaintiff's patent rights to due process and

equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution. As such, review by this Court is respectfully sought.

4. C.C.P. Section 583.310 is arbitrary, capricious and unreasonable and, as such, is violative of the constitutionally guaranteed right to due process.

The statutory scheme under which defendants in this State are allowed to seek dismissal of actions for "lack of prosecution" is in itself and in application applied arbitrarily, capriciously and unreasonably, in that permitting rote dismissal of actions which have been actively litigated after the running of a five year period is wholly arbitrary and unrelated to a legitimate state goal. Particularly absent tolling for periods of time in which, through action of defendant, prosecution of an action is not possible, the scheme bears no rational relationship to the goal it purports to accomplish — dismissal of actions for *lack* of prosecution.

In the present action, no findings were made by the trial court. Petitioner's action was summarily dismissed based on the purported running of a five year period notwithstanding tolling periods and active litigation during that period. The Court of Appeal herein specifically rejected all of Petitioner's tolling arguments and thereupon affirmed dismissal. As such, Plaintiff's rights under the United States Constitution, Fourteenth Amendment, to due process and equal protection of the law were violated, for which redress is therefore respectfully sought.

Recognizing the strong policy considerations of promoting effective and efficient adjudication of all meritorious claims, as well as the strong policy, of

litigating all cases on their merits, the arbitrary enforcement of the five year rule furthers neither one of these goals nor any possible, legitimate, goal of the State. In order to be a valid exercise of the State's power, the means to effectuate the sought end must neither be arbitrary nor capricious but rather, must further a legitimate State goal. In the instant case, the method by which the courts have dealt with Petitioner herein, serves no legitimate purpose but only operates to deprive Petitioner of her due process rights as guaranteed her by the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For all the foregoing reasons, Petitioner JANET G. MAYNARD respectfully requests that this honorable Court grant her Petition for a Writ of Certiorari.

DATED: July 17, 1987

Respectfully submitted,

LAW OFFICES OF MARVIN M. MITCHELSON

By: _____

MARVIN M. MITCHELSON

Attorneys for Petitioner

JANET G. MAYNARD

APPENDIX

APPENDIX

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

JANET G. MAYNARD, Plaintiff and Appellant, v. HARRY PRIESTER, Defendant and Respondent.	)	B 017135 (Super.Ct.No. C 337 244)

COURT OF APPEAL-SECOND DIST.
FILED
FEB - 5 1987
CLAY ROBBINS, JR. Clerk
Deputy Clerk

APPENDIX "A"

Appeal from the dismissal of a breach of contract action for failure to bring the cause to trial within five years. (Code Civ. Proc., §§ 583.310, 583.360.)[1] Affirmed.

Janet Maynard commenced the action at bench against defendant Harry Priester on September 10, 1980. In her complaint, plaintiff alleged that some years earlier defendant had agreed, among other things, to divorce his wife, marry plaintiff, purchase a ranch to house plaintiff and her two children from a previous marriage, and support plaintiff, her children, and her mother for the remainder of their lives in consideration of plaintiff's agreement to act as defendant's confidant, travel companion, housekeeper, decorating consultant, and ranch manager. Plaintiff further alleged that defendant had actually given her money for the down payment on the purchase of a home, co-signed a purchase money note with her, and provided her with financial support for some time prior to breaching their alleged oral agreement. Plaintiff prayed for relief in the form of a constructive trust, damages, and specific performance of defendant's alleged promise to support and house her family.

On October 31, 1980, defendant filed a demurrer to the complaint. The trial court overruled the demurrer and defendant then petitioned Division Five of this court for a writ to compel the trial court to sustain his demurrer. Following the denial of both his petition for a writ of mandate or prohibition on May 14, 1981, and a petition for a hearing in the Supreme Court on June 10, 1981, defendant answered plaintiff's complaint on June 17, 1981.

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[1] Except as otherwise indicated, all statutory references are to the Code of Civil Procedure.

An at-issue memorandum was filed by plaintiff on August 12, 1982. In April 1984, plaintiff notified defendant that a trial setting conference had been scheduled for June 15, 1984. On that date, however, the matter was ordered "off calendar subject to resetting."

On October 4, 1985, defendant filed his motion to dismiss plaintiff's complaint on the ground that the five year period for bringing the action to trial had expired. Thereafter, on October 16, 1985, plaintiff noticed a motion to specifically set a trial date. On October 21, 1985, the trial court granted defendant's motion to dismiss plaintiff's action, thereby rendering plaintiff's motion to set a trial date moot. This appeal followed.[2]

Sections 583.310 and 583.360, subdivision (a), (former § 583, subd.(b)), provide, in pertinent part, that "[a]n action shall be brought to trial within five years after [it] is commenced" and, if it is not, that the "action shall be dismissed by the court . . . ." Section 583.360, subdivision (b), further provides that dismissal is mandatory and that the five-year deadline is "not subject to extention, excuse, or exception, except as expressly provided by statute." Section 583.340, however, specifically excludes from the computation of the five-year period any time during which it "is impossible, impracticable, or futile" to bring the action to trial (subd. (c)) or during which the court's jurisdiction to try the matter is suspended (subd. (a).)

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[2] Plaintiff's notice of appeal states the appeal is taken from the trial court's "ruling" of October 21, 1985. The minute order entered that date is not an appealable order. (See § 904.1.) To reach the merits of the cause, however, we will deem the minute order to incorporate a final order of dismissal and will interpret plaintiff's notice of appeal as applying to such final order.

On appeal, plaintiff first contends that the running of the five-year statute was tolled during the more than 220 days of the pendency of defendant's demurrer and petitions because it was impracticable and futile to bring her action to trial during that period. It is well settled that the excuses which warrant application of the impracticability and futility tolling provisions now codified in section 583.340, subdivision (c), do not encompass delays incident to the disposition of a demurrer. (See *Crown Coach Corp. v. Superior Court* (1972) 8 Cal.3d 540, 548; *Standard Oil Co. v. Superior Court* (1976) 61 Cal.App.3d 852, 857; see also *Anderson v. City of San Diego* (1953) 118 Cal.App.2d 726 729-731.)

Plaintiff also argues, however, that the five-year statute was tolled during the pendency of defendant's petitioners from the overruling of his demurrer because "the jurisdiction of the trial court was suspended" during the appellate proceedings. This contention misses the mark. The principle plaintiff here relies on is embodied in section 916, subdivision (a). That section deprives a trial court of jurisdiction to proceed with regard to a judgment or order from which an appeal has been perfected. A petition for a writ to compel a trial court to sustain a demurrer or to prohibit a trial court from proceeding after it has overruled a demurrer is an original proceeding, not an appeal (See Cal. Rules of Court, rule 56), and section 916, therefore, is inapplicable.

Finally, plaintiff argues that "crucial and extensive" delays were caused by defendant in bringing the action to trial and that the trial court had a mandatory duty to set a trial date prior to the expiration of the five-year period. A motion for preference in trial setting is addressed to the sound discretion of the trial court. (§ 36,

subd. (d); *Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342.) The record on appeal does not reveal precisely why the trial setting conference of June 15, 1984, was taken off calendar. Nor is there any indication in the record of any request thereafter by plaintiff to specifically set a trial date, except plaintiff's notice of October 16, 1985, filed more than a month after the expiration of the five-year period. Plaintiff had the burden of bringing her cause to trial within five years after she filed her complaint. (*Massey v. Bank of America* (1976) 56 Cal.App.3d 29, 33.) The duty was hers at each and every stage of the proceedings "to use due diligence to expedite [her] case to a final determination." (*Crown Coach Corp. v. Superior Court, supra*, at p. 548.) At bench, plaintiff failed to meet her burden and the trial court properly dismissed her cause.

The minute order of October 21, 1985, granting defendant's motion to dismiss, is modified by adding thereto the following setnece: "The action is dismissed."

As so modified, the order is affirmed. Defendant Harry Priester shall recover costs.

NOT FOR PUBLICATION

We concur:

FUKUTO, J.

ROTH, P.J.

GATES, J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, No. B017135

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JANET G. MAYNARD, Petitioner
and
HARRY PRIESTER, Respondent

MAYNARD

v.

PRIESTER

Appellant's petition for review DENIED.

SUPREME COURT
FILED
APR 22 1987
Laurence P. Gill, Clerk
S000337 DEPUTY

RECEIVED APR 24 1987

LUCAS

Chief Justice

APPENDIX "B"

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on July 17, 1987, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Lee J. Cohen
Offices of Leff & Jensen
9665 Wilshire Boulevard
Seventh Floor
Beverly Hills, California 90212

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 17, 1987, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)